

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Oct 17 2011

Per [unclear]

**CANEXUS CHEMICALS
CANADA L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

**Docket No. 42131
Fin. Docket No. 35524**

23114
231113

**PETITION OF BNSF RAILWAY COMPANY TO VACATE THE EMERGENCY
SERVICE ORDER AND ESTABLISH AN EXPEDITED SCHEDULE TO ADDRESS
COMPLAINANT'S COMMON CARRIER CLAIMS**

In an October 14, 2011 decision, the Board, on its own initiative, took the highly unusual step of issuing an emergency service order under 49 U.S.C. §11123 that directed BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") to "maintain the status quo" and continue to provide transportation of chlorine from the Canadian facilities of complainant, Canexus Canada, Ltd. ("Canexus") to Kansas City while the Board resolves the legal issues raised in Canexus's May 25, 2011 complaint. The order – issued without notice or the opportunity for a hearing – is not based on a service failure, as has been the case in all other Board precedent for issuing such an order, and therefore is plainly inapplicable to resolving Canexus's purely commercial concerns. The order thus constitutes a serious mis-use of the Board's emergency service powers that should be immediately rectified. BNSF, as we will explain below, hereby requests that the Board vacate the emergency service order and establish

an expedited procedural schedule and date certain for the prompt resolution of the issues raised by Canexus in its complaint based on BNSF's willingness to voluntarily continue to carry the traffic at issue through that date certain.

Emergency service orders are extraordinary remedies. In the past, the Board and its predecessor have exercised the authority to issue such orders very sparingly to deal with imminent cessations of service resulting primarily from rail bankruptcies, financial failures resulting in the termination of service or widespread operating "meltdowns".

Here, in contrast, the precipitating event of the emergency service order is Canexus's unwillingness to accept alternative service from Canadian Pacific Railway to Kansas City because the commercial terms of CP's transportation are unacceptable to Canexus. While the substance is confidential, Canexus has also rejected the commercial terms offered to it for continued service to Kansas City by BNSF during the STB-sponsored mediation. Previously, the agency has consistently refused to issue emergency service orders for such commercial reasons. Emergency service orders cannot be used to address concerns that a shipper may have about the level of rates that are available for service. The Board's departure from precedent in this regard, without explanation and without affording BNSF the opportunity to be heard on the matter, is arbitrary and capricious and an abuse of discretion.

Of particular importance, BNSF urges the Board to consider the policy ramifications of its order of October 14. Distilled to its core, the Board's action has allowed Canexus to create its own "service emergency" through its unilateral rejection of commercial terms offered by two separate railroads, which is contrary to the intent of the statute, all Board precedent and will create an incentive for any shipper to reject the commercial terms of a service offering for the

purpose of creating a "service emergency." BNSF submits that the Board should very carefully consider the unanticipated consequences of this action.

Emergency service was ordered virtually out of the blue in this case without any request from the shipper or notice from the Board that an emergency service order was being contemplated, and without any hearing to determine whether the standards for issuing an emergency service order were satisfied under these circumstances, which they plainly are not. The Board must act promptly to rectify this denial of BNSF's procedural rights.

Moreover, the order effectively singles out BNSF as the only railroad responsible for providing common carrier service to Kansas City, arbitrarily ignoring other alternatives available to provide Canexus's service. BNSF neither originates nor terminates the traffic at issue, and Canexus indisputably has multiple ways to have its traffic moved from its manufacturing facility in Vancouver to interchange with the Union Pacific. The order is also an unlawful extraterritorial exercise of the Board's authority over movements originating in Canada. The Board does not have authority under the statute to order BNSF to originate hazardous TIH traffic in Canada and bring it into the United States.

BNSF therefore requests that the Board vacate the emergency service order. BNSF recognizes that the Board has said it needs additional time to resolve the questions raised by Canexus's complaint as to the underlying common carrier obligations of the various railroads that have the ability to provide the service that Canexus seeks. BNSF has already agreed to several extensions of the existing tariff while this dispute has been pending, and BNSF would again be willing to voluntarily provide common carrier service to the Kansas City interchange if the Board vacates the emergency service order and commits to hear and fully resolve the underlying legal claims raised by Canexus by a date certain, which BNSF believes should be

within 60 to 90 days. However, given the lack of valid legal or factual grounds for the order and the serious precedent that the order creates, it is important that the Board vacate the emergency service order while the Board addresses those legal claims.

If the Board declines to vacate the existing 30-day emergency service order, the Board should address the pending due process issues created by its unilateral action by promptly setting a hearing to address the legal and factual basis of the existing emergency service order and any subsequent service orders it may be contemplating.

I. Procedural Background

The facts leading to this dispute are set out in BNSF's June 15, 2011 Response to the Board's Order of June 8, 2011 Regarding Its Legal Position ("BNSF's June 15 Legal Position") and are not repeated in detail here. As explained in BNSF's June 15 Legal Position, BNSF and Canexus have had several discussions since 2010 over the commercial terms under which BNSF would provide transportation of Canexus's Canadian chlorine to U.S. destinations. BNSF has never refused to provide transportation of Canexus's chlorine. Canexus has simply disagreed with the service terms that BNSF has offered. Other railroads are available to provide Canexus's service, but Canexus has chosen not to pursue those alternatives.

There has never been a service emergency here. The dispute has focused only on the reasonableness of commercial terms for service, not on the existence of a possible service emergency. In response to Canexus's complaint, BNSF proposed that Canexus, UP and BNSF engage in Board-supervised mediation in an effort to resolve the parties' differences over the commercial terms of transportation of Canexus's chlorine. BNSF extended its existing common carrier pricing authority several times to allow those discussions to take place. At the mediation that took place on August 24, 2011 and in subsequent communications, BNSF and Canexus

again discussed alternative commercial terms for the transportation sought by Canexus. Those discussions were unsuccessful in resolving the dispute, and on September 14, 2011, Canexus notified the Board that mediation was unsuccessful and asked the Board to issue a ruling on Canexus's complaint. Canexus never requested an emergency service order.

On September 19, 2011, Canexus sent another letter to the Board informing the Board that it had obtained a rate quotation from CP applicable to rail service from Canexus's production facility in Canada to Kansas City for interchange with UP. Canexus explained to the Board that it would not use the CP transportation alternative because "it makes absolutely no economic sense for Canexus to consider this [CP] alternative," given the level of the rate established by CP. Letter from Canexus, at 2 (filed Sept. 19, 2011). Canadian National Railway is also available to provide service for Canexus, and it is unclear from the record whether Canexus even bothered to request service from CN.

On October 5, 2011, CP requested leave to intervene as a party and submitted comments arguing that the Board does not have jurisdiction to compel any railroad to establish a common carrier rate for rail transportation to be provided in Canada. Letter from CP, at 2-3 (filed Oct. 5, 2011). CP also stated that, under Canadian law, its informal rate quotation to Canexus does not become a lawful rate in Canada until it is published in a tariff or in a confidential contract.

On October 14, 2011, the Board issued its emergency service order, stating that it "order[ed] the parties to maintain the status quo until we have resolved the underlying legal question of the railroads' obligations." *Order* at 5. The Board directed emergency service for 30 days, which the Board indicated that it may extend if the "transportation emergency continues to exist." *Id.* The Board granted CP's request to intervene, noting that Canexus and CP have

submitted correspondence addressing whether “CP might be an alternative carrier for the shipments at issue.” *Order* at 3.

II. Legal Standard

The Board and its predecessor have exercised great restraint in using the authority given to it under 49 U.S.C. §11123 to issue emergency service orders. In fact, the law is clear that emergency service orders are intended to be “extraordinary relief” limited to urgent situations involving widespread service failures or imminent failure of service. *Keokuk Junction Ry. Co.—Alternative Rail Service—Line of Toledo, Peoria & W. Ry. Corp.*, STB Fin. Docket No. 34397 (STB served Oct. 31, 2003); *Granite State Concrete Co., Inc. & Milford-Bennington R.R. Co., Inc. v. Boston & Maine Corp. & Springfield Terminal Ry. Co.*, STB Docket No. 42083, at 6 (STB served Sept. 15, 2003). Congress intended that the Board’s authority to issue emergency service orders in 49 U.S.C. § 11123 “be used sparingly and in a focused way” because the “statute, on its face, does not give [the Board] *carte blanche* to direct service simply because a party would prefer to be served one way rather than another.” *Joint Petition for Service Order, Rail Service in the Western United States*, STB Service Order No. 1518, STB Ex Pate No. 573, at 4 (STB served July 31, 1998).

Consistent with the Board’s limited authority under section 11123, the law is clear that emergency service orders are impermissible when rail service is in fact available to a shipper, as is the case here. *Granite State Concrete Co., Inc. & Milford-Bennington R.R. Co., Inc. v. Boston & Maine Corp. & Springfield Terminal Ry. Co.*, STB Docket No. 42083, at 6 (STB served Sept. 15, 2003) (denying request for relief under 49 U.S.C. § 11123 and 49 C.F.R. part 1146 for alleged inadequate service from railroad with trackage rights because shipper refused offer of service from incumbent carrier)(“*Granite State*”); *Expedited Relief for Service Inadequacies*, 3

S.T.B. 968, 978 (1998) (“[A]s a general rule no relief is necessary for petitioners that can already access another carrier capable of handling the service needs.”).

The law is also clear that emergency service orders cannot be used to address a shipper’s concerns over rate levels. Emergency service orders are to be limited to true *service* emergencies. See e.g., *Albemarle Corporation—Alternative Rail Service—Line of the Louisiana and North West Railroad Company*, STB Fin. Docket No. 34931, at 4 (STB served Oct. 6, 2006) (“The alleged ‘service inadequacy’ at issue here . . . arises from Albemarle’s disagreement with the level of LNW’s charges for switching services and is not a failure to move traffic. . . . [R]ate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123.”)(“*Albemarle*”); see also *Keokuk Junction Railway Company – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corporation*, STB Finance Docket No. 34397, at 6 (STB served Oct. 31, 2003) (“The alleged service inadequacy here is based primarily on the rates TP&W seeks to charge. . . . Rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123.”).

As explained below, the Board’s October 14, 2011 order is not consistent with the law governing application of section 11123.

III. Argument

A. The Board’s Order Is Procedurally Defective And Is An Abuse Of Discretion

Emergency service orders are very rare. They have been issued infrequently in the past to deal with extreme circumstances, in almost all cases the circumstances involved bankruptcy or financial failure of the incumbent railroad. In a notable exception, the Board issued an emergency service order in the aftermath of the UP’s merger with Southern Pacific Transportation Corporation based on its finding that there was the prospect of a widespread

service failure in Western United States. Moreover, the Board issued its emergency service order in that case only after a 12-hour hearing with 60 witnesses. *Joint Petition for Service Order*, 2 S.T.B. 725 (1997).

Emergency service orders are not justified when other railroads are available to provide service or where the possible cessation of service is caused only by an underlying economic dispute. See *Granite State*, slip op. at 6; *Albemarle*, slip op. at 4. And when there is a question about the availability of alternative service, the Board generally denies any request for an emergency service order until the record is clear that there is no alternative service available. Indeed, in *Roseburg Forest Products Co., Timber Products Co., LP., Suburban Propane, LP, Crowley D&L, Inc., Sousa Ag Serv., & Yreka W. R.R. Co.—Alternative Rail Service—Central Oregon & Pacific R.R., Inc.*, STB Finance Docket No. 35175, at 8-9 (STB served Mar. 4, 2009), several shippers sought an emergency service order, which the Board denied because, among other things, there was a question about the availability of service from other railroads. The Board held the record open to develop additional information on the availability of alternative service, recognizing that an emergency service order is not appropriate unless it is clear that the shipper has no alternative service.

Here, the Board issued its order without any input from the parties. No party requested an emergency service order or attempted to show that such an order was justified on the facts or that the legal standards under 49 U.S.C. §11123 were met. The Board conducted no hearing or requested any party to submit information on the circumstances that would be required to support an emergency service order. The Board issued its order without any effort to distinguish the longstanding precedent holding that emergency service orders are not appropriate in cases like

this one where any possible service problem is the result of the shipper's disagreement with the commercial terms that have been offered. The Board's order is an abuse of discretion.

The emergency service order is procedurally deficient in other ways. The statute gives the Board authority to issue an emergency service order for 30 days. To extend the order, the Board must "find[] that a transportation emergency . . . continues to exist." 49 U.S.C. §11123(c)(1). While the Board's October 14, 2011 order extends only 30 days, the Board stated that it was issuing the order to give itself more time to address the arguments already made by the parties on Canexus's complaint as well as to entertain additional evidence and arguments that may be made by the parties under a new procedural schedule that extends well beyond the 30-day time limit of the emergency order. By issuing a schedule that extends beyond the 30-day period, the Board appears to have impermissibly pre-determined that it will impose additional emergency service orders to allow completion of the proceeding. But the Board has made no findings that would support such an extension or sought any comments or information from the parties on the need for or validity of such an extension. The Board may not circumvent the statute in this manner.

B. The Board Lacks Jurisdiction To Issue The Emergency Service Order

In addition to the procedural deficiencies in the order, the order lacks any legal or factual foundation. The first problem with the order is that the Board lacks jurisdiction to order BNSF to originate traffic in Canada for purposes of importing that traffic into the United States. BNSF described the jurisdictional limits on the Board's authority in its June 15 Legal Position. *See BNSF's June 15 Legal Position* at 6-8. CP's October 5, 2011 letter expanded upon the governing law that the limits on the Board's ability to issue orders addressed to traffic originating outside the United States.

All of the traffic at issue here originates at Canexus's facilities in Canada, and most of that traffic moves to Kansas City directly from North Vancouver. By ordering BNSF to "preserve the status quo," the Board is ordering BNSF to originate shipments in Canada, import them into the United States, and carry them to Kansas City. The most basic jurisdictional principles underlying the Board's territorial reach prohibit the Board from issuing such an order. The statute expressly limits the Board's jurisdiction "only to transportation in the United States. . . ." 49 U.S.C. §10501(a)(2). The Board's emergency service order violates this well-established jurisdictional limit on the Board's authority by reaching out to BNSF in Canada and requiring BNSF, consistent with the "status quo," to originate traffic at North Vancouver for import into the United States. The order is an unlawful extraterritorial exercise of the Board's authority.

C. There Are No Grounds For An Emergency Service Order

The Board's October 14, 2011 Order is also invalid because it lacks any valid legal or factual basis. The Board bases its emergency service order on its assertion that there is a "failure of traffic movement." Order at 4. By a "failure of traffic movement," the Board means that after October 15, in the absence of a BNSF common carrier rate to Kansas City, there would be no alternative other than BNSF that is available to Canexus to move chlorine from North Vancouver to Kansas City for interchange with UP. According to the Board's logic, if BNSF is not required to provide the service, the transportation will not occur. That assumption is clearly erroneous.

1. Canexus's Displeasure With The Level Of The Rate Provided By CP Does Not Amount To A "Failure Of Traffic Movement"

BNSF explained in its June 15 Legal Position that there are four potential ways to move Canexus' chlorine from North Vancouver to Kansas City. The chlorine could move on CN, the

carrier that physically serves the Canexus production facilities, into the United States for interchange with UP or other carriers for movement to Kansas City. The chlorine could move on BNSF from North Vancouver (after BNSF receives the chlorine from CN in an interswitching service) to Kansas City, the routing that Canexus has sought to pursue in this proceeding. The chlorine could move on BNSF from North Vancouver to Portland or Spokane for interchange with UP and further movement to Kansas City. Or the chlorine could move on CP from North Vancouver (after CP receives the chlorine from CN in an interswitching service) directly to Kansas City. *See BNSF's June 15 Legal Position, Verified Statement of David L. Garin*, at 3.

Indeed, Canexus acknowledged in its September 19, 2011 letter to the Board that it could obtain transportation of its chlorine from CP to Kansas City via a rail alternative to service by BNSF. The only reason that Canexus elected not to have the traffic handled by CP is that Canexus did not like the rate that CP offered for the service. CP offered Canexus a rate that would have moved the traffic to Kansas City, and Canexus chose not to take advantage of that alternative service. But the existence of the CP alternative means that there has been no failure of service that would justify an emergency service order. The level of the CP rate has nothing to do with the existence or non-existence of a service alternative.

The case law is abundantly clear that the Board's emergency service authority does not extend to situations where a shipper has an available transportation option but does not like the terms that have been offered for that alternative service. *See Albemarle* at 4; *Keokuk Junction* at 6. The statute was intended to address service emergencies, not concerns by a shipper about rate levels. Canexus may not like the rate that CP offered, but it is undeniable that CP offered to provide an alternative service. There is no factual basis for the Board's assertion in the October 14, 2011 decision that there has been a "failure of traffic movement."

Even if the statute allowed the Board to use its emergency service authority under these circumstances, which it does not, it would be extremely dangerous precedent for the Board to invoke its emergency service authority simply because a shipper has concluded that the rate charged by one of its railroad suppliers is too high. The Board's emergency services authority is supposed to be exercised only in extraordinary circumstances. Shippers have options for addressing complaints about rates and other service terms, and they cannot be allowed to circumvent those established procedures through Board emergency service orders.

2. The Lack Of A Published Tariff For CP's Service To Kansas City Does Not Constitute A "Failure Of Traffic Movement"

To the extent the Board has jurisdiction over the portion of the movement that occurs in the United States, the Board was also wrong to conclude that an alternative routing on CP is not available because CP did not formally publish a tariff for that route. The governing statute in this country does not require publication of a tariff. By providing Canexus with a rate quote, CP was holding itself out as a carrier willing to provide the requested service, which is all that is required under U.S. law. Section 11101(a) of the statute requires that a railroad provide service in response to a reasonable request for service. Section 11101(b) requires that a railroad provide on request the rate that the railroad will charge for that service. U.S. law does not require publication of a tariff. The fact that CP did not formalize its rate quote to Canexus in a contract or a published tariff is therefore irrelevant to the question whether the alternative CP service to Kansas City is available. The Board erred by relying on the lack of a published tariff for CP's movement as the basis for imposing an emergency service order.

Indeed, the Board mischaracterized CP's argument on the existence of an alternative route. CP's argument was that under *Canadian law*, not U.S. law, an alternative route does not exist unless there is a published tariff covering that route. If that were true, and if the lack of an

alternative route is the result of CP's decision not to publish a tariff under Canadian law for the Canadian portion of the movement, then the supposed lack of an alternative route occurs only as a result of the operation of Canadian law. In other words, if there is a service failure or a "failure of traffic movement," it is because of a problem in Canada, not a problem in the United States. As to the U.S. portion of the cross-border movement, there is no service failure. The Board cannot issue an emergency service order to U.S. railroads operating in the United States because of a "failure of traffic movement" in Canada. If the problem is in Canada, Canexus must go to the Canadian authorities to resolve that problem. The Board cannot use its emergency service authority to solve a problem that exists, if at all, in Canada as a result of the operation of Canadian law.

D. The Emergency Service Order Is Arbitrary And Discriminates Against BNSF

By ordering the parties to "maintain the status quo," the Emergency Service Order discriminates against BNSF. The record shows that there are three, and possibly four, railroads that can provide the service to Kansas City that Canexus wants. Nevertheless, BNSF is the only one of those four railroads being ordered to provide the long haul service *to Kansas City*. UP is only ordered to provide service from Kansas City the destination, which it has continuously asserted its willingness to do, so there was no need for that portion of the Board's service order directed to UP. The only reason that BNSF has been singled out to provide the service is that BNSF has been providing the service while the present dispute has played out. There is no basis in the record for believing that transportation of chlorine over the other potential railroad service providers would be any less safe or reliable than BNSF's transportation. In effect, BNSF is being penalized for acting responsibly while this dispute has been pending. That is the essence of arbitrary agency action.

BNSF is in the same situation as CP with respect to the transportation of Canexus's chlorine to Kansas City. Neither BNSF nor CP actually originates the traffic. Both railroads receive the traffic in a switching service from CN, which has physical access to the Canexus facilities. Both BNSF and CP receive the Canexus traffic in Canada and must bring it into the United States to interchange with another railroad for delivery to the ultimate destination. To the extent either railroad is required to accept the traffic in switching service from CN, that requirement is imposed under Canadian law which applies equally to BNSF and CP. And both railroads are able to bring the traffic to Kansas City and able to interchange the traffic with UP at Kansas City. The circumstances are virtually identical for both BNSF and CP, yet BNSF is the only railroad ordered to provide the "emergency service." It is arbitrary and discriminatory to for the Board to single out BNSF to provide the service that Canexus has requested.

Indeed, if the Board had a valid basis for ordering any railroad to provide Canexus's service, the logical and rational choice would have been CP. CP indicated in response to an inquiry from Canexus that it was willing to provide the service to Kansas City, albeit at a rate that Canexus does not want to pay. BNSF has said it is willing to provide the service to Portland and Spokane, but not to Kansas City. Since CP apparently is willing to provide the service, there is no rational basis for the Board's order to BNSF to provide the service to Kansas City, which it is unwilling to do. The Board appears to have singled out BNSF only to protect Canexus from paying what Canexus believes to be an unduly high rate. Given that there are other procedures for addressing shipper concerns about rate levels, the Board's order to BNSF rather than CP to provide the service is arbitrary and capricious.

Finally, the emergency service order does not reflect an even-handed treatment by the Board of the difficult problems raised by the transportation of TIH. The Board's order gives

Canexus a free pass for creating this problem in the first place – first by making irresponsible commercial decisions to sell its highly toxic products at distances over 2,000 miles from its British Columbia production facilities and second by entering into a private contract deal with UP that was intended to burden BNSF with the long haul. If the Board is willing to make Canexus the beneficiary of transportation by BNSF, it should also recognize that Canexus needs to share the risks of transporting its ultra-hazardous product by stepping forward and accepting liability for a spill or other incident to the full extent of its resources.

E. The Board Should Immediately Vacate Its Emergency Service Order And Establish An Accelerated Schedule For Addressing Canexus's Underlying Common Carrier Claims

The Board made it clear that it was issuing the emergency service order to give itself additional time to “resolv[e] the underlying legal question of the railroads’ [common carrier] obligations.” Order at 5. The issues raised by Canexus’s complaint and the implications of the positions taken by the parties in this proceeding are important ones that require careful consideration by the Board. BNSF notes that the Board stated in the October 14, 2011 order that “[o]ne or both of these railroads [BNSF or UP] is violating its common carrier obligation by refusing to provide service.” Order at 5. BNSF hopes that this comment does not mean that the Board has already decided how to assess the existence of a common carrier obligation in these circumstance, which would be particularly inappropriate in light of the new evidence that an alternative to BNSF or BNSF/UP service is available from CP.

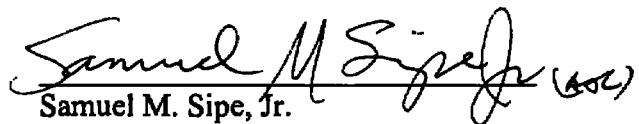
In any event, BNSF understands the Board’s interest in taking additional time to address the underlying issues in this case. BNSF has already agreed to multiple extensions of its existing common carrier price authority to give the Board and the parties time to address this dispute. BNSF would be willing once again to implement its prior price authority so that the status quo

can be preserved while the Board resolves this matter. BNSF's voluntary action will obviate any need for the inappropriate emergency service order, which should be vacated. In addition, the Board should commit to issuing a decision by a date certain, which BNSF suggests should be within 60-90 days.

If the Board adopts this approach, BNSF suggests that the Board's proposed schedule for three simultaneous filings by the parties be shortened to only an opening and reply filing, and that the date for rebuttal filings be used instead for the Board to hear oral argument from the parties. BNSF believes that such an approach will give the Board time to address the underlying common carrier issues without the need to use the Board's authority under 49 U.S.C. § 11123 in ways that were never intended by Congress and that would establish dangerous precedent.

If the Board declines to vacate the existing 30-day emergency service order, the Board should address the pending due process issues created by its unilateral action by promptly setting a hearing to address the legal and factual basis of the existing emergency service order and any subsequent service orders it may be contemplating.

Respectfully submitted,



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October 17, 2011

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2011, I have served a copy of the foregoing Petition of BNSF Railway Company to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant's Common Carrier Claims on the following by e-mail and by first-class mail, postage prepaid:

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